92-950

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

23 WEST WASHINGTON STREET, INCORPORATED,

Petitioner,

v.

CITY OF HAGERSTOWN, MARYLAND

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. WAS THE MOTIVATION OF THE CITY OF HAGERSTOWN IN ENACTING AN ADULT BOOK STORE ZONING ORDINANCE A MATERIAL FACT CONCERNING THE CONSTITUTIONALITY OF THE ORDINANCE UNDER THE STANDARDS SET FORTH IN UNITED STATES V. O'BRIEN, 391 U.S. 367 (1968) AND RENTON V. PLAYTIME THEATRES, 475 U.S 41 (1986)?

II. WAS THE CITY OF HAGERSTOWN ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT THE CITY IN ENACTING AN ADULT BOOK STORE ZONING ORDINANCE COMPLIED WITH THE FIRST AMENDMENT STANDARDS SET FORTH IN UNITED STATES V. O'BRIEN, 391 U.S. 367 (1968) AND RENTON V. PLAYTIME THEATRES, 475 U.S 41 (1986), WHEN THE RECORD CONSTRUED IN A LIGHT MOST FAVORABLE TO PLAINTIFF, REFLECTED THAT THE CITY ENACTED THE MOST RESTRICTIVE REGULATION POSSIBLE AND THEREBY "BURDEN[ED] SUBSTANTIALLY MORE SPEECH THAN [WAS] NECESSARY TO FURTHER GOVERNMENT'S LEGITIMATE INTERESTS"?

LIST OF PARTIES

The parties are:

1. 23 WEST WASHINGTON STREET, INC.

2. CITY OF HAGERSTOWN, MARYLAND.

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SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1989

23 WEST WASHINGTON STREET, Incorporated

PETITIONER,

v.

City of Hagerstown, MARYLAND

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, 23 West Washington Street, Incorporated, requests that the Supreme Court of the United States grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above captioned proceeding on August 4, 1992.

REFERENCE TO REPORTS OF OPINIONS OF OTHER COURTS IN THIS CASE

The prior opinions and decisions in this case are unreported and appear in the Appendix as follows: Magistrate Daniel E. Klein, Jr.'s Report and Recommendation (APX. 3);[1] Per Curiam opinion of the United States Court of Appeals for the Fourth Circuit (APX. 42).

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit for which Petitioner seeks review was entered on August 4, 1992. On August 13, 1992, Petitioner filed a Petition for Rehearing and Suggestion For Rehearing in Banc,

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[1]The designation APX refers to the pages of the Appendix.

which was denied by an order filed on September 3, 1992. (APX. 57).

PERTINENT CONSTITUTIONAL PROVISIONS AND LOCAL ORDINANCES

The ordinance called into question in this case is City of Hagerstown Adult Bookstore Zoning ordinance, which amended the City of Hagerstown's Code. The text of this ordinance is set forth in the appendix. (APX. 59-65).

STATEMENT OF THE CASE

On or about September 6, 1988, the Mayor and City Council of the City of Hagerstown, Maryland amended the Hagerstown Zoning Ordinance to include for the first time provisions for adult bookstores and theaters. These amendments provide, among other things, that adult bookstores and adult motion picture theaters were not permitted uses in the City's central business district

(C-3 district). At the time that the amendment was passed, there were only two adult bookstores located in the City of Hagerstown, both of which were in the City's only C-3 district. The amendments expressly provided that adult bookstores and theaters were to be removed from the C-3 district within two years of the effective date of the ordinance (October 6, 1990). The impact of the amendments was to be the elimination of the only two adult bookstores in the City.

Plaintiff sought declaratory and injunctive relief in the District Court based on 42 U.S.C. § 1983 for the abridgment of First Amendment rights. On March 22, 1991, the Defendant filed a Motion for Summary Judgment. On June 11, 1991, the Court referred the Motion for Summary Judgment to the Honorable Daniel

E. Klein, Jr., United States Magistrate Judge, for a report and recommendation. (APX. 1). On August 21, 1991, Magistrate Judge Klein issued a Report and Recommendation that summary judgment be entered against the Plaintiff, once the City of Hagerstown, Maryland, corrected a typographical error in the ordinance. (APX. 35).

The Magistrate's Report and Recommendation was that the Hagerstown adult bookstore was a valid time, place and manner regulation. The Magistrate also reasoned that because the predominant concern motivating the enactment of the ordinance revolved around social and economic decay and that relocating the two adult bookstores did not impose a restriction on speech which was greater than necessary. The

Magistrate Judge was of the opinion that motivation behind the amendments was not a valid basis for declaring the legislation unconstitutional. (APX. 33-34).

Exceptions to the Magistrate's Report and Recommendation were filed on August 30, 1991. On November 5, 1991, the Court adopted the Record and Recommendation of Magistrate Judge Klein. (APX. 36-40). The Fourth Circuit affirmed in an unreported, per curiam opinion on August 4, 1992. (APX. 43-56).

ARGUMENT

The decision of the Court of Appeals in this case conflicts with those of the Fifth, Seventh and Tenth Circuits on the matters in issue. The decision of the Court of Appeals in this case conflicts with the principles articulated by this

Court concerning the legislative predicate for the enactment of valid, time, place and manner regulations and those circumstances in which this Court will look behind a facially valid ordinance to determine whether it otherwise violated the First Amendment.

The courts below held that the motivation behind the amendments were not a valid basis for declaring the legislation unconstitutional. (APX. 33-34, 47-55). A rule adopted for general application, however, becomes suspect when it applies to a small number of persons. Richardson v. Town of Eastover, 922 F.2d 1152, 1158 (4th Cir. 1991); see also United States v. O'Brien, 391 U.S. 367, n.30 (1968); F.O.P. Lodge #121 v. City of Hobart, 864 F.2d 551, 554, 556 (7th Cir. 1988). Petitioner argued in

the courts below that the exclusion of the stores in question from their existing location is suspect, because the ordinance is a rule purportedly adopted for general application but applies to only a small number of identifiable persons, i.e., the only two adult bookstores in the City. Otherwise, the enactment of what appears to be a valid time, place and manner, legislation becomes a potential method of censorship that is unreviewable and the First Amendment thereby illusory. Cf. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)(addressing First Amendment risks associated with unbridled licensing schemes; the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to

measure the licensor's action and prompt judicial review).

The City, when the record is construed in a light most favorable to Plaintiff, enacted the most restrictive regulation possible and thereby "burden[ed] substantially more speech than [was] necessary to further government's legitimate interests". Board of Trustees v. Fox, 492 U.S. 469, 476-79 (1989); Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989). While the City need not select the least restrictive or least intrusive means it may not select the most restrictive. Id. Here, the legislative record reflects no evidence of any study conducted by the City or empirical data relied upon by the City concerning the particular adult bookstores located within the City's

downtown area. The City could not then have entertained evidence to support the elimination of the existing adult bookstores; and, therefore, there was no evidence to support removal of these two particular stores. The City entertained but did not enact two lesser measures, i.e., grandfathering the two existing adult bookstores, or, in the alternative, providing for a special exception process. Each of these alternative measures were lobbied against by an anti-pornography group. Additionally, there is indication that even less restrictive measures could have been utilized by the City to deal with whatever problem it believed the two adult bookstores posed to the City center, e.g., different store fronts, signage, etc. The City did not articulate in the legislative record the

reason that it enacted the provision removing the two existing stores and that their removal directly advanced a substantial government interest. There does not appear to be any evidence in the legislative record on this point. Young v. American Mini Theatres, 427 U.S. 50, 56 n.12 (1976); Shad v. Borough of Mount Ephraim, 452 U.S. 61, 64-66 (1981); City of Renton v. Playtime Theatres, 475 U.S. 41 (1986); Arcara v. Cloud Books, Inc., 478 U.S. __, 92 L.Ed.2d 568, 578 (1986); id., 92 L.Ed.2d, at 579 (O'Connor, J., concurring).

The Magistrate Judge did not examine whether the City's goal was substantial in excluding the two stores and the cost "carefully calculated." Nor did the courts below separately consider whether the removal of the two stores "promot[ed]

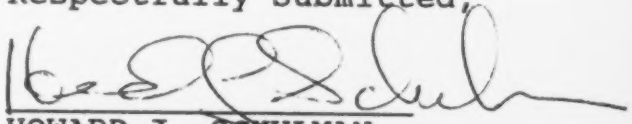
a substantial government interest that would be achieved less effectively absent the regulation." Id., 49 U.S., at 799; Adolph Coors Co. v. Brady, 944 F.2d 1543, 1549-1552 (10th Cir. 1991). Unlike those other cases involving constitutional challenges to adult bookstore zoning laws, the link between the restriction in question and the substantial interest is not self evident so as to allow the courts to defer to the legislature without more in the legislative record. Id.

CONCLUSION

The Petition should be granted to resolve conflicts between the decision of the Court of Appeals in this case and those of the other Circuits, as well as the apparent conflict with applicable decisions of this Court. A decision by

this Court will resolve the uncertainty that now exists by virtue of conflicting rulings on important questions of federal law that are matters of public interest and importance.

Respectfully Submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

23 WEST WASHINGTON STREET, INC.,

Plaintiff

vs. CIVIL ACTION NO. MJG-90-2443

CITY OF HAGERSTOWN, MARYLAND,

Defendant

ORDER OF REFERENCE TO
UNITED STATES MAGISTRATE JUDGE
FOR RECOMMENDATIONS ON PENDING MOTION

Pursuant to 28 U.S.C. §636 and Local Rule 301 of this Court, this case is referred to the Honorable DANIEL E. KLEIN, JR., United States Magistrate Judge for the District of Maryland, to conduct proceedings as appropriate and submit recommendations for the disposition of the Motion for Summary Judgment that has been filed prior to this Order of Reference.

SO ORDERED this 11th day of June, 1991.

/s/

Marvin J. Garbis

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

23 W. WASHINGTON STREET, INC.

v. CIVIL ACTION NO.: MJG-90-2443

CITY OF HAGERSTOWN, MARYLAND

REPORT AND RECOMMENDATION

On September 19, 1990, Plaintiff, 23 W. Washington Street, Inc. ("Plaintiff"), filed suit against the City of Hagerstown, Maryland ("the City"), alleging that the City's amended zoning ordinance regulating the location of adult bookstores and adult theatres violates the First and Fourteenth amendments. Paper No. 1 ("Complaint"). The Complaint seeks declaration and injunctive relief from the zoning ordinance. Complaint at 4. On February 22, 1991, the City responded by filing a motion for summary judgment, arguing that according to recent Supreme Court

decisions the zoning ordinance is constitutional as a matter of law and therefore there is no genuine issue as to any material fact. Paper No. 7. The Plaintiff opposed the motion. Paper No. 12. The City filed a reply brief. Paper No. 13. The motion is now ready for disposition. No hearing is deemed necessary. Local Rule 105.6.

I. Facts

Plaintiff operates an adult bookstore located in the City's C-3[1] commercial zone. Paper No. 8, Exhibit

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[1]"The purpose of the C3 District is to provide for commercial uses appropriate in the central area of the city by permitting those retail commercial stores, offices, in town personal and business services, other commercially oriented uses and high-density residential uses appropriate for a regional downtown care." Paper No. 8, Exhibit 46 at 19, Amended Ordinance Section 68-18.

11. On September 6, 1988, the City adopted amendments to its zoning ordinance, Section 68-16 through 68-19, 68-24 and 68-38, regulating the location of adult bookstores and adult theatres. Paper No. 8, Exhibits 43 and 46 ("Amended Ordinance"). The Amended Ordinance defines these establishments in the following manner.

> ADULT BOOK STORE - Means an establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," or an establishment with a segment or section devoted to the sale or display of such material.
>
> ADULT MOTION PICTURE THEATER - Means an enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized

by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

ADULT MINI MOTION PICTURE THEATER - Means an enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

Paper No. 8, Exhibit 46 at 68.1., Amended Ordinance Section 68-38. The Amended Ordinance defines "specified sexual activities" and "specified anatomical areas" in the following manner.

SPECIFIED ANATOMICAL AREAS - Means:

A. Less than completely and opaquely covered:
   (1) Human genitals, pubic region,
   (2) Buttock, and
   (3) Female breast below a point immediately above the top of the areola; and

B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES - Means:

A. Human genitals in a state of sexual stimulation or arousal;

B. Acts of human masturbation, sexual intercourse or sodomy;

C. Fondling or other erotic touching of human genitals, public [sic] region, buttock or female breast.

Paper No. 8, Exhibit 46 at 74-74.1, Amended Ordinance Section 68-38.

Under the Amended Ordinance, adult businesses are allowed to operate only within the City's C-2[2] commercial zones

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[2]"The purpose of the C2 District is to provide logical locations of all businesses of a more general nature than might be expected to be found in a neighborhood." Paper No. 8, Exhibit 46 at 16, Amended Ordinance Section 68-17.

with the additional restriction that

> no such use may be permitted within one thousand (1000) feet of the boundary of property upon which exists any church, school, hospital, nursing home, park or any multiple-family dwelling owned by public or quasi public authority and intended primarily for use by senior citizens or other similar land uses for human care and needs.

Paper No. 8, Exhibit 46 at 17, Amended Ordinance Section 68-17. Upon the enactment of this Amended Ordinance on October 6, 1988, Plaintiff's operation of an adult bookstore in a C-3 commercial zone became a non-conforming use. Under the ordinance, the Plaintiff was allowed a two year amortization period measured from October 6, 1988 in which to relocate its business to a C-2 zone. With regard to this time period, the Amended Ordinance specifically provides that

> Adult book stores, adult motion

> picture theaters and adult mini motion picture theaters, situate [sic] in the zoning district C-1, C-2, C-3 or C-4 at the time this ordinance becomes effective shall be removed by two (2) years from the effective date of the ordinance.[3]

Paper No. 8, Exhibit 46 at 39, Amended Ordinance, Section 68-24(f). This two year time period expired shortly after

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[3]Though the issue was not raised by the Plaintiff, the undersigned notes that the inclusion of C-2 districts within this amortization provision makes the Amended Ordinance unconstitutional. Such a provision would effectively ban all adult book stores, adult motion picture theatres and adult mini motion picture theatres from operating within the City. However, based on the City's argument supporting its Motion for Summary Judgment, and the fact that Section 68-17B(25) of the ordinance permits adult book stores, etc. in C-2 districts, the City will be given the benefit of the doubt. The inclusion of C-2 districts in Section 68-24F of the Amended Ordinance will be regarded as a typographical error. "C-2" should be removed immediately from this section to preserve the constitutionality of the Amended Ordinance.

the Plaintiff's complaint against the City was filed on September 19, 1990, and the Plaintiff has not yet relocated.

According to the City, the main impetus for enacting the Amended Ordinance was the concern "regarding the diminution in property values, increase in crime, the protection of minors, and the growth of the downtown relative to adult bookstores." Paper No. 7 at 8. However, the Plaintiff maintains that the anti-pornography sentiment of the City's citizens and council members inspired the enactment of the Amended Ordinance and thus the ordinance is merely a device to regulate protected speech and restrict freedom of expression. Paper No. 12 at 8.

II. Summary of Arguments

The City claims there is no disputed

factual issue regarding the constitutionality of the zoning ordinance because the ordinance is content-neutral and conforms in all respects with the recent, relevant United States Supreme Court law and Fourth Circuit law. Paper No. 7 at 12-13. On the other hand, the Plaintiff claims that there are material factual disputes regarding the City's objective in passing the ordinance, the restrictive nature of the ordinance and the scope of its intrusion upon freedom of expression. Paper No. 12.

III. Summary Judgment Standard

The Fourth Circuit has said the following about summary judgment:

> Summary judgment is proper only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts. Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir. 1979); Stevens v.

> Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950). The party seeking summary judgment carries the burden of showing that there is no genuine issue as to any material fact in the case. Fed. R. Civ. P. 56(c); Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). When determining whether the movant has met its burden, the court must assess the documentary materials submitted by the parties in the light most favorable to the nonmoving party. Gill v. Rollins Protective Services Co., 773 F.2d 592, 595 (4th Cir. 1985).

Pulliam Invest. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987). Further, the opposing party "may not rest upon the mere allegations or denials of [its] pleadings, but [its] response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." Bland v. Norfolk and Southern R.R. Co., 406 F.2d 863, 866 (4th Cir.

1969) (referring to Fed. R. Civ. P. 56(e)).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) the United States Supreme Court elaborated on the standard for determining whether summary judgment should be granted, stating that "...summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." The Court held that,

> at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial....[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative,

> summary judgment may be granted.

Id. at 249-50 (citations omitted).

IV. Discussion

According to the standard set forth above, if this Court finds that sufficient evidence exists so that a jury could reasonably return a verdict favorable to the Plaintiff, then the City's Motion for Summary Judgment should be denied. The Plaintiff has directed the Court's attention to three issues which it considers essential to the determination of whether summary judgment is appropriate in the instant case.

The first issue concerns the motivation behind the enactment of the Amended Ordinance. The Plaintiff maintains that there is a genuine issue for trial regarding the City's objective in amending the zoning ordinance. The

Plaintiff refers to the City Planning Commission ("Commission") minutes as proof that the zoning ordinance was amended with the goal of restricting protected speech and freedom of expression. Paper No. 12 at 3. While it is true that in the minutes of the Commission meeting, some citizens testifying in favor of the amendment expressed strong anti-pornography sentiments, Paper No. 8, Exhibit 7 at 4, the motivation behind the legislation is not a valid basis for declaring the legislation unconstitutional. See United States v. O'Brien, 391 U.S. 367, 382-86 (1968); South Carolina Education Association v. Campbell, 883 F.2d 1251, 1258-59 (4th Cir. 1989). Necessarily, courts should not "restrain the exercise of lawful power on the assumption that a

wrongful purpose or motive has caused the power to be exerted." McCray v. United States, 195 U.S. 27, 56 (1904). For example, in O'Brien, the Supreme Court declined to void legislation regarding the illegality of burning one's draft card on the ground that the legislative purpose was unwise. The Court held that Congress undoubtedly had the power to enact the legislation in that exact form regardless of whether "the same or another legislator made a 'wiser' speech about it." O'Brien at 384. Similarly, in South Carolina Education Association v. Campbell, the Fourth Circuit reinforced its holding in Holt v. Richmond, 459 F.2d 1093 (4th Cir. 1972), stating

> where legitimate reasons exist for the challenged action "it far surpasses judicial power to strike down legislative action because some of the legislators may have been motivated by some

> impermissible reason in addition to those acknowledge permissible and legitimate reasons."

883 F.2d at 1258.

In the instant case, the City undoubtedly had the power to respond to the secondary effects of unregulated adult book stores by enacting a zoning ordinance requiring adult bookstores to locate only in C-2 district. "Cities are free to regulate adult theatres and bookstores by either dispersing them or concentrating them in a particular area." 5297 Pulaski Highway, Inc. v. Perryville, 69 Md. App. 590, 596, 519 A.2d 206, 209 (1987). Therefore, the question of what motivated the City to amend the zoning ordinance does not create a material factual dispute because it is irrelevant to the determination of the constitutionality of the ordinance.

The second and third issues which the Plaintiff raises, however, are relevant to the determination of whether the Amended Ordinance is constitutional, and are thus relevant to the determination of whether the summary judgment motion should be granted. The Plaintiff argues that the Amended Ordinance suppresses pornographic communications by eliminating the two existing adult bookstores located in the downtown area and that the ordinance is not narrowly drawn to impose no greater restriction than necessary on speech and communication protected by the First Amendment. Paper No. 12 at 7. The Plaintiff maintains that these issues present material disputes of fact concerning the ordinance's possible limitations on freedom of speech.

In O'Brien, the Supreme Court set forth a standard according to which the constitutionality of a government regulation on speech and conduct must be measured. The Court held that a government regulation is constitutional (1) if it is within the Government's constitutional power, (2) if there is a substantial governmental interest which is furthered by the regulation, (3) if this substantial governmental interest is unrelated to the suppression of free expression, and (4) if the restriction on First Amendment freedoms which will invariably result from the regulation is no greater than necessary to further that substantial governmental interest. O'Brien at 377. In the instant case, the Amended Ordinance adheres to this standard and is therefore constitutional.

With respect to the first element of the O'Brien test, the Supreme Court has established that a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." Young v. American Mini Theatres, 427 U.S. 50, 71 (1976); See also Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986). Interestingly, in Renton, the Supreme Court held a zoning ordinance, remarkably similar to the amended zoning ordinance in the instant case, to be constitutional. In Renton, the town, basing its decision on a study performed in Seattle, Washington, concerning the secondary effects of unregulated adult theaters on communities, enacted a zoning ordinance restricting the location of adult theaters. The zoning ordinance at issue

in Renton left approximately 520 acres within the city open to the operation of adult motion picture theaters but also restricted such theaters from locating within one thousand feet of "any residential zone, single- or multiple-family dwelling, church, park or school." Renton at 43. After reviewing the Renton zoning ordinance, the Supreme Court upheld the constitutionality of the ordinance, stating that

> Renton has not used "the power to zone as a pretext for suppressing expression," but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.

475 U.S. at 54 (citations omitted).

In addition to the Supreme Court

rulings in American Mini Theatres, Inc. and Renton, the Fourth Circuit has found that ordinances regulating the location of adult bookstores reflect "a legitimate exercise of police power under which the state may limit the use of private property for the public welfare." 11126 Baltimore Boulevard v. Prince George's County, 886 F.2d 1415, 1421 (4th Cir. 1989). The Fourth Circuit in 11126 Baltimore Boulevard recognized "the broad power of municipalities to implement land use controls to meet the increasing encroachment of urbanization on the quality of life." Id. Consequently, in the present case, the City's amendment of the zoning ordinance to improve the quality of the downtown area was well within its power as a municipality and well within the boundaries of the

Constitution.

Regarding the second and third components of the standard set forth in O'Brien, it has been established that as long as a government regulation on speech is "content-neutral," the regulation does not violate the First and Fourteenth Amendments. See Renton, 475 U.S. at 48; see also 11126 Baltimore Boulevard v. Prince George's County, 886 F.2d 1415 (4th Cir. 1989). In 11126 Baltimore Boulevard, the Fourth Circuit held a zoning ordinance which limited the location of adult book stores to be content-neutral and a valid time, place and manner restriction because the ordinance was "designed to combat urban blight and protect minors - valid interest unrelated to the suppression of particular speech." Id at 1420. The

Court in 11126 Baltimore Boulevard also noted Justice Powell's observation in American Mini Theatres, Inc. that "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'" Id. at 1420 (quoting American Mini Theatres, Inc., 427 U.S. at 82 n.4 (Powell, Jr., concurring)).

The City, in the instant case, provides uncontroverted evidence showing that its interest in regulating the location of adult bookstores and adult theaters was not predicated on a desire to suppress pornographic communication. The evidence demonstrates that the predominant concerns motivating the enactment of the 1988 Amended Ordinance

were the preservation of the quality of the City's neighborhoods, the restoration of the quality of the downtown commercial district, and the prevention of crime and drug abuse. The City relies on a report from the City of Austin, Texas, to validate its concern over protecting the community from social and economic harm. Paper No. 8, Exhibit 36 at 1-6. The Austin, Texas, report reveals that sex-related crimes are higher in areas where adult business [sic] are located and that residential property values are detrimentally affected when adult businesses operate in close proximity to each other. Id. The report also cautions that the operation of adult businesses in certain areas of the city may result in the transformation of adjacent family-oriented, owner-occupied

neighborhoods into more transient, renter-occupied environments. Id. Moreover, the study advises that because adult businesses usually draw most of their clientele from outside the immediate areas in which they are situated they should be restricted to districts located along heavily travelled streets and interstate highways rather than near single family neighborhoods. Id.

To further demonstrate the adverse effects which the adult businesses have on the central commercial district and the surrounding residential areas, the City also refers to a court order from the Circuit Court of Washington County prohibiting 23 West Washington Street, Inc. from selling a fake Controlled Dangerous Substance known as "Supertoot".

Paper No. 8, Exhibits 12-14. The City asserts that the Plaintiff's prior sale of "Supertoot," which is an adulterant for cocaine, demonstrates the potential for increased drug use and distribution within the City's central commercial districts and residential areas. Paper No. 8 at 5-6.

Additionally, the City offers testimony from citizens regarding the secondary effects of the adult businesses in the central commercial districts. One of the citizens living on East[4] Washington Street testified at a Hagerstown Planning Commission meeting that every evening there are "violent and vicious fights, loitering" and "[a]

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[4]23 West Washington Street, Inc. is actually located at 23 East Washington Street.

neighbor in the building calls the police an average of three times a week." Paper No. 8, Exhibit 7 at 4.

In Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Supreme Court held that an ordinance which "by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,'" does not violate the First and Fourteenth Amendments. Id. at 48. The objectives of the 1988 Amended Ordinance in the instant case reflect the same concerns which motivated the enactment of the zoning ordinance in Renton. Thus, it follows the valid governmental interests unrelated to the suppression of speech

sustain the constitutionality of the Amended Ordinance.

Finally, with respect to the fourth element of the O'Brien test, the method by which the City chose to advance its interest in maintaining a certain standard of social and economic well-being within its community comports with the methods approved by the Supreme Court in American Mini-Theatres, Inc. and more recently in Renton. In American Mini-Theatres, Inc., the Court upheld the constitutionality of a zoning ordinance regulating the location of adult theatres, stating that

> [t]here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

427 U.S. at 61.

Similarly, in Renton, the Court held that the city ordinance which left "...more than five percent of the entire land area of Renton, open to use as adult theater sites," passed constitutional muster. Renton, 475 U.S. at 54. The Court reasoned that this allowed sufficient alternative avenues for the regulated conduct and that the First Amendment only requires that a government regulation refrain from denying "a reasonable opportunity to open and operate an adult theater within the city..." Id.

In the instant case, the City enacted an ordinance which called for the relocation of adult bookstores and adult theaters; not for the suppression of the messages conveyed by the pornographic

materials sold in these establishments. The Plaintiff, however, argues that because the City did not choose the least restrictive enforcement method available, there is a material factual dispute regarding the constitutionality of the Amended Ordinance. The Plaintiff asserts that the City could have required different store fronts or signs, or made a special exception for the existing adult businesses, rather than requiring the relocation of all adult businesses to C2 districts. This argument is without merit. The Supreme Court in American Mini-Theatres, Inc. held that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71. The solution provided by the Amended Ordinance is to enhance the

viability of the downtown area by assigning owners and operators of adult bookstores and adult theatres certain areas of the City where they may conduct business. Paper No. 8, Exhibit 46 at 16.[5] Because the predominant concern motivating the enactment of the Amended Ordinance revolves around the social and economic decay or urban living, relocating the sources which generate such decay does not impose a restriction on speech which is greater than necessary.

Based on the Supreme Court rulings in both Renton and American Mini Theatres, Inc., it is evident that cities

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[5]Currently there are over twenty C2 districts within the City where adult businesses may operate legally. See Paper No. 8, Exhibit 11.

have the power to regulate the use of land, and that zoning ordinances regulating adult businesses are not unconstitutional as long as a substantial government interest is involved. As the Supreme Court in Renton and American Mini Theatres, Inc., observed, a City's desire to improve its community and upgrade the quality of its commercial and residential areas are interests which are sufficiently substantial to uphold the constitutionality of a zoning ordinance regulating the location of adult businesses. Renton at 50; American Mini Theatres, Inc., at 71-73. Furthermore, it has been established that ordinances which treat adult businesses differently than other businesses are not necessarily "content-based." Renton, 475 U.S. at 47. As long as the zoning ordinance is aimed,

not at the content of the materials being sold by the adult businesses, but rather at the secondary effects of the adult businesses on the surrounding communities, the ordinance is constitutional. Id.

With regard to the standards established by the United States Supreme Court, there is nothing which suggests that the Amended Ordinance in the instant case is unconstitutional. The Amended Ordinance never purports to exclude adult bookstores or adult theatres from locating within the City; it merely relegates them to certain areas of the City in an effort to foster an increase in the quality of city living. Additionally, the ordinance is not aimed at regulating protected speech, but rather it is aimed at regulating the

location of adult businesses. Therefore, there exists no genuine issue of material fact regarding the constitutionality of the City's 1988 amended zoning ordinance.

V. Conclusion

Therefore upon the expirey of the time for taking exceptions hereto, it is recommended that the City's Motion for Summary Judgment be GRANTED. Further, it is recommended that this recommendation not be accepted until such time as the City cures the inconsistency in the ordinance pointed out in footnote no. 3.

DATE: August 21, 1991

/s/
DANIEL E. KLEIN, JR.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

23 WEST WASHINGTON STREET, INC.,

Plaintiff

vs. CIVIL ACTION NO. MJG-90-2443

CITY OF HAGERSTOWN, MARYLAND,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION AFTER CONSIDERING OBJECTIONS

This Order is issued upon consideration of the Report and Recommendation of United States Magistrate Judge Klein dated August 21, 1991, the objections thereto, and after a de novo review of the entire record.

Plaintiff primarily raises two objections to the Magistrate Judge's Report: (1) that there is a material dispute of fact regarding whether the City had a forbidden objective of restricting free speech in passing the

Amended Ordinance, and (2) that the law was not narrowly drawn to impose no greater restriction than necessary on free speech and communication. The Magistrate Judge's Report and Recommendation explicitly addresses both of these contentions. The Court has no further comment on the Magistrate Judge's analysis other than to note that the Court fully agrees.

In footnote 3 of his Report and Recommendation, Magistrate Judge Klein notes that while Section 68-17B(25) of the Amended Ordinance designates that "adult" businesses may only operate within the City's C-2 commercial zones, Section 68-24(F) states that "adult" businesses are not allowed "in the zoning districts C-1, C-2, C-3 [and] C-4"

(emphasis added).[1] Magistrate Judge Klein properly recognizes that if this latter section's inclusion of the C-2 zone is not a typographical error, then the Amended Ordinance would be unconstitutional because the provision would effectively ban all adult businesses from operating within the City.

In response to this clerical problem in the Amended Ordinance, the City has, as of October 22, 1991, corrected Section 68-24(F), as codified at Section 68-24(D), to exclude "adult" businesses from

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[1]The section in question, as originally enacted in the Amended Ordinance, and as referred to by Magistrate Judge Klein, was labeled Section 68-24(F). In the 1990 codification of the Code of the City of Hagerstown, Section 68-24(F) was renumbered as Section 68-24(D).

C-1, C-3 and C-4 zones, but not C-2 zones. The corrected section, therefore, is now in congruence with Section 68-17B(25). Any question of the Amended Ordinance's constitutionality raised by footnote 3 in the Magistrate Judge's Report and Recommendation is therefore moot.

Conclusion

For the foregoing reasons, the said Magistrate Judge's Report and Recommendation is hereby AFFIRMED and ADOPTED and the Court takes the following action:

1. Defendant's Motion for Summary Judgment is GRANTED.

2. Judgment shall be entered in favor of Defendant by separate Order.

3. The Clerk is directed to mail a copy of this Order to all parties or their respective counsel of record.

SO ORDERED this 5th day of November, 1991.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

23 WEST WASHINGTON STREET, INC.,

Plaintiff

vs. CIVIL ACTION NO. MJG-90-2443

CITY OF HAGERSTOWN, MARYLAND,

Defendant

JUDGMENT ORDER

By separate Order issued this date, the Court has granted the Motion for Summary Judgment filed by the Defendant. Accordingly, Judgment is hereby ENTERED in favor of Defendant City of Hagerstown, Maryland against Plaintiff 23 W. Washington Street, Inc. with costs.

SO ORDERED this 5th day of November, 1991.

/s/

Marvin J. Garbis

United States District Judge

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

23 WEST WASHINGTON STREET, INC.

Plaintiff-Appellant,

v. No.: 91-1879

CITY OF HAGERSTOWN, MARYLAND,

Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
M.J. Garbis, District Judge.
(CA-90-2443-MJG)

Argued: April 10, 1992
Decided: August 4, 1992

Before RUSSELL, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Howard J. Schulman, Baltimore, Maryland, for Appellant, Daniel Karp, ALLEN, JOHNSON, ALEXANDER & KARP, Baltimore, Maryland for Appellee. ON BRIEF: Robert E. Kuczynski, Edward L. Kuczynski, KUCZYNSKI & KUCZYNSKI, Hagerstown, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

23 West Washington Street, Inc., the operator of an adult bookstore in Hagerstown, Maryland, filed this action under 42 U.S.C., §1983, seeking (1) a declaratory judgment that a Hagerstown city ordinance restricting the location of adult businesses violates the First and Fourteenth Amendments and (2) an injunction prohibiting its enforcement. It now appeals from a summary judgment entered against it by the district court. We affirm.

In April 1987, the Coalition of Community Values proposed an amendment to the zoning ordinance of Hagerstown, Maryland, modeled on Detroit, Michigan's

ordinance regulating the location of adult businesses. Public and private hearings were held before the Hagerstown Planning Commission in December 1987 and January and February 1988 and before the Hagerstown City Council in April, May, June, August and September 1988. During these hearings, the Coalition of Community Values argued that the presence of adult businesses in the center of town was inconsistent with the city's plans for improving the downtown, and it submitted a summary of studies conducted in several cities concerning negative effects of adult businesses on local communities. It also submitted a copy of an order issued by the Circuit Court for Washington County, Maryland, enjoining 23 West Washington Street from selling a substance allegedly commonly used to

dilute cocaine. Many citizens submitted oral and written statements inveighing against pornography and calling for the removal of the two adult bookstores in town. Other citizens registered their concerns about crime in the vicinity of the bookstores and their deleterious effect on the value of neighboring real estate. Despite public notice in local newspapers, no objection to the proposal to regulate the location of adult businesses was ever raised.

On September 6, 1988, the Mayor and City Council of Hagerstown approved the proposal and amended the city's zoning ordinance so as to forbid the use of land for "adult book stores," "adult motion picture theaters," and "adult mini motion picture theaters" in areas zoned C-1 (commercial local), C-3 (commercial

central) and C-4 (regional shopping center), allowing such uses only in districts zoned C-2 (commercial general) and only if not within 1000 feet of churches, schools, hospitals, nursing homes, parks and public multifamily dwellings. The ordinance also requires that nonconforming adult businesses "be removed by two (2) years from the effective date of the ordinance," which was October 6, 1988.

Since 1980, 23 West Washington Street has operated an adult bookstore selling books, periodicals, novelties, lingerie, films and other materials in downtown Hagerstown in an area designated C-3 under the city's zoning ordinance. Because the store falls within the zoning ordinance's definition of "adult

bookstore,"* which is prohibited in areas zoned C-3, it was faced with the ordinance's requirement of relocating or closing down if it wished to continue as an adult bookstore. In September 1990, it sued the City of Hagerstown for declaratory and injunctive relief, alleging that the ordinance violates its First Amendment right to free speech.

In response to Hagerstown's motion for summary judgment, which incorporated the legislative record, the bookstore argued, on the basis of the legislative history, that there were disputes about whether the ordinance's purpose was

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*The definition of "adult bookstores" is nearly identical to that used in the ordinance upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50, 53-54 (1976), and 23 West Washington Street does not object to it.

suppression of pornographic communication, whether the ordinance does suppress it in downtown Hagerstown, and whether the ordinance was narrowly tailored. A magistrate rejected all of these arguments, because "the predominant concerns motivating the enactment...were the preservation of the quality of the City's neighborhoods, the restoration of the quality of the downtown commercial district, and the prevention of crime and drug abuse." After the city had corrected an apparent typographical error in its ordinance, which would effectively have banned all adult businesses, the district court adopted the magistrate's report and ordered summary judgment for Hagerstown.

The First Amendment's protection of free speech extend to the sale of non-

obscene, sexually explicit materials. See Roth v. United States, 354 U.S. 476, 487-88 (1957). It has long been held, however, the "government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Supreme Court treated as such a content-neutral time, place, or manner restriction a

municipality's zoning ordinance restricting the location of adult movie theaters, because it was justified as an attempt to combat the "secondary effects" of such businesses on crime, retail trade, property values and the quality of urban life generally. 475 U.S. at 48-49. The decision in Renton largely determines the result in this case.

As did the City of Renton, Hagerstown justifies its restrictions of adult businesses to only some areas of the city as an attempt to combat secondary effects of adult businesses on the quality of urban life, particularly in downtown Hagerstown. 23 West Washington Street does not dispute that a regulation with this justification would be content-neutral under Renton, since it does not refer to the content of the

protected speech. See 475 U.S. at 48. Rather, its principal argument is that Hagerstown's purpose was not, in fact, to combat secondary effects of adult businesses, but to suppress free speech in the form of sexually explicit materials.

Although the resolution amending Hagerstown's zoning ordinance to include the new restrictions did not include an explicit statement of purpose, such a statement is not required to survive attack under the First Amendment. See Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456 (1991) (upholding a state statute against First Amendment attack despite absence of explicit statement of purpose and any legislative history). There is no question that Hagerstown's Planning Commission and City Council were

presented with studies by other cities of the secondary effects of adult businesses and with statements by various citizens about increased crime and decreased property values near the existing adult businesses in Hagerstown. And, contrary to the assertion of 23 West Washington Street, Hagerstown did not need to conduct its own studies of the effects caused by the two existing adult businesses in Hagerstown, but could rely on reasonably relevant studies conducted by other cities. Renton, 475 U.S. at 51-52.

23 West Washington Street argues nevertheless that Hagerstown was reacting to the many private citizens supporting the ordinance who expressed their distaste for the adult businesses in Hagerstown and for pornography generally.

There is no evidence in the record, however, that the legislators themselves acted on a distaste for pornography because of its content. Even assuming that the citizens' motives, to the extent driven by speech content, are to be imputed to legislators, courts will ordinarily not hold legislation serving an otherwise adequately supported legitimate purpose unconstitutional merely because some legislators may harbor illicit motives. See Renton, 475 U.S. at 47-48 (upholding restrictive ordinance at summary judgment despite "motivating factor" to restrict First Amendment speech); D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 146-47 (4th Cir. 1991).

23 West Washington Street also contends that the amended ordinance is

not "narrowly tailored" to serve a proper time, place, or manner restriction, see Ward, 491 U.S. at 798, because Hagerstown considered but rejected proposals to include "grandfather clauses" for the two existing adult bookstores and to allow special exceptions. Neither of these complaints has merit. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest...the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 800. To the extent either of the rejected alternatives would have permitted the unchanged operation of the existing adult bookstores to continue downtown, it would have severely undercut

the purpose of the ordinance to reduce the secondary effects of adult businesses in downtown Hagerstown. Rather than require the bookstores to change their operations, Hagerstown merely required them to move, after an adequate two-year period in which to find new locations. Cf. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980) (upholding a law criminalizing the operation of more than one adult business in one building after a six-month amortization period). Since strict scrutiny is not required for content-neutral time, place, or manner restrictions, see Ward, 491 U.S. at 798-99 n.6, we will not second guess Hagerstown's reasonable choice between adequate alternatives.

Under the holding of Renton

permitted a valid, content-neutral time, place, or manner restriction on the location of adult bookstores, we conclude that the district court properly granted summary judgment in this case in favor of Hagerstown.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 3, 1992

No. 91-1879
CA-90-2443-MJG

23 WEST WASHINGTON STREET, INCORPORATED

Plaintiff - Appellant

v.

CITY OF HAGERSTOWN, MARYLAND

Defendant - Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for

rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Russell and Judge Murnaghan.

For the Court,

/s/ Bert M. Montague
CLERK

RESOLUTION

WHEREAS; Article 66B of the Annotated Code of Maryland, and the Charter of The City of Hagerstown, empowers the Legislative Body of The City of protecting and promoting the health, safety and general welfare of the citizens of The City of Hagerstown; and

WHEREAS; The procedures prescribed for amending the Zoning Ordinance of The City of Hagerstown by Article 66B of the Annotated Code of Maryland, The Charter of the City of Hagerstown, and Chapter 68, Zoning, of the General Code of The City of Hagerstown, have been complied with; and

WHEREAS; The Mayor and Council of The City are desirous of amending Chapter 68, "ZONING," Part 1, "CITY ZONING," Article I, General, by amending Section 68-16. C-1 District (Commercial Local); Section 68-17. C-2 District (Commercial General); Section 68-18. C-3 District (Commercial Central); Section 68-19. C-4 District (Regional Shopping Center); Section 68-24. Nonconforming Uses; Section 68-38, Definitions; specific; and

WHEREAS; The Mayor and Council deem it advisable and to the best interests of the citizenry of The City of Hagerstown to amend and enact certain revisions to said Ordinance; and

WHEREAS; After complying with all the aforementioned requirements, the Legislative Body for The City of

Hagerstown has determined and finds as a matter of fact that certain revisions, amendments, and additions are necessary and desirable; and

WHEREAS; After complying with all the aforementioned requirements, the Legislative Body for The City of Hagerstown has determined and finds as a matter of fact that certain revisions, amendments, and additions are necessary and desirable; and

BE IT FURTHER RESOLVED, ENACTED, AND ORDAINED that Chapter 68, "ZONING," Part 1, "CITY ZONING," Article I, General, Section 68-16. C-1 District (Commercial Local); Section 68-17. C-2 District (Commercial General); Section 68-18. C-3 District (Commercial Central); Section 68-19. C-4 District (Regional Shopping Center); Section 68-24. Nonconforming Uses; Section 68-38, Definitions; specific; is amended to include:

Section 68-16. C-1 District (Commercial Local).

B. (Amended 12-4-78) Principal permitted uses, in accordance with Section 68-29; local retail or service shops, other than adult book stores, adult motion picture theaters and adult mini motion picture theaters, including but not limited to:

Section 68-17. C-2 District (Commercial General).

B. (Amended 12-4-78) Principal permitted uses, in accordance with Section 68-29; including but not limited to:

(25) Adult book store, adult motion picture theater, adult mini motion picture theater, provided no such use may be permitted within one thousand (1000) feet of the boundary of property upon which exists any church, school, hospital, nursing home, park or any multiple-family dwellings owned by public or quasi public authority and intended primarily for use by senior citizens or other similar land uses for human care and needs.

(26) All uses permitted as principal permitted uses in a C-1 District.

Section 68-18. C-3 District (Commercial Central).

B. (Amended 12-4-78) Principal permitted uses, in accordance with Section 68-29; other than adult book stores, adult motion picture theaters and adult mini motion picture theaters, including but not limited to:

Section 68-19. C-4 District (Regional Shopping Center).

B. (Amended 12-4-78) Principal

permitted uses, in accordance with Section 68-29; other than adult book stores, adult motion picture theaters and adult mini motion picture theaters, including but not limited to:

Section 68-24. Nonconforming Uses.

C. Except as hereinafter provided, nonconforming uses, as defined herein, shall be allowed to continue in existence in perpetuity, provided that said use does not cease for any reason whatsoever through a period of one (1) year. If any nonconforming use of land shall cease for any reason whatsoever through a period of one (1) year, said nonconforming use shall be deemed to have been abandoned, and the then applicable zoning provisions shall apply to the area in question. (Amended 12-4-78).

D. Adult book stores, adult motion picture theaters and adult mini motion picture theaters, situate in the zoning districts C1, C2, C3 or C4 at the time this ordinance becomes effective shall be removed by two (2) years from the effective date of the ordinance.

Section 68-38. Definitions; specific.

As used in this ordinance, the following terms shall have the meanings indicated:

ADULT BOOK STORE - Means an

establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical area," or an establishment with a segment or section devoted to the sale or display of such material.

ADULT MOTION PICTURE THEATER - Means an enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

ADULT MINI MOTION PICTURE THEATER - Means an enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

SPECIFIED ANATOMICAL AREAS - Means:

A. Less than completely and opaquely covered:

(1) Human genitals, pubic region,

(2) Buttock, and

(3) Female breast below a point immediately above the top of the areola; and

B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES - Means:

A. Human genitals in a state of sexual stimulation or arousal;

B. Acts of human masturbation, sexual intercourse or sodomy;

C. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

BE IT FURTHER RESOLVED, ENACTED AND ORDAINED, that the remaining provisions of said Ordinance remain in full force and effect; and

BE IT FURTHER RESOLVED, ENACTED AND ORDAINED, that the following amendment of Chapter 68, ZONING, be and is hereby enacted; and

BE IT FURTHER RESOLVED, ENACTED AND ORDAINED, that the effective date of this Ordinance shall be and is thirty

(30) days from the date of its passage.

WITNESS:

MAYOR AND COUNCIL
OF THE CITY OF
HAGERSTOWN, MARYLAND

_____
Georgiann N.
Lucas, City Clerk

By: _____
Steven T. Sager,
Mayor

DATE: 8/16/88

DATE OF PASSAGE: _____

EFFECTIVE DATE: _____

Supreme Court, U.S.
FILED
DEC 30 1992
OFFICE OF THE CLERK

No. 92-950

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

23 WEST WASHINGTON STREET, INCORPORATED,

Petitioner,

v.

CITY OF HAGERSTOWN, MARYLAND,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT E. KUCZYNSKI,
EDWARD L. KUCZYNSKI,
KUCZYNSKI & KUCZYNSKI,
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ALLEN, JOHNSON, ALEXANDER & KARP,
Suite 840,
300 East Lombard Street,
Baltimore, Maryland 21202,
(410) 727-5000,
For Respondent.

THE DAILY RECORD COMPANY, 11 EAST SARATOGA STREET, BALTIMORE, MD 21202

49pp

QUESTION FOR REVIEW

WHETHER THERE IS A DISPUTE AS TO ANY MATERIAL FACT THAT THE AMENDMENTS TO THE CITY OF HAGERSTOWN ORDINANCE, WHICH REGULATE LOCATION OF ADULT BUSINESSES, ARE CONSTITUTIONAL AND THAT RESPONDENT IS ENTITLED TO JUDGMENT IN ITS FAVOR AS A MATTER LAW?

LIST OF PARTIES

Respondent agrees with Petitioner's designation of the parties.

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SUPREME COURT OF THE UNITED STATES

No. 92-950

October Term, 1992

23 WEST WASHINGTON STREET, Incorporated

PETITIONER,

v.

CITY OF HAGERSTOWN, MARYLAND

RESPONDENT

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, City of Hagerstown, Maryland, submits this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

CITATION OF OPINIONS OF OTHER COURTS IN THIS CASE

The opinions of the courts below are set forth in the Appendix to Petitioner's Brief as follows: Magistrate Daniel E. Klein, Jr.'s Report and Recommendation - Petitioner's Apx. 3; Order Adopting Magistrate Judge's Recommendation After Considering Objections - Petitioner's Apx. 36; and Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit - Petitioner's Apx. at 42.

JURISDICTIONAL STATEMENT

Respondent agrees with Petitioner's statement of this Court's jurisdiction.

PERTINENT CONSTITUTIONAL PROVISIONS AND LOCAL ORDINANCES

The text of the First Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States is set forth at Apx. 1.

The legislation at issue in this matter is part of the City of Hagerstown's Zoning Ordinance. Respondent has reproduced the enabling resolution which enacted the ordinance in question beginning at Apx. 2.[1]

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[1] Petitioner failed to include the entire resolution which amended the ordinance. Petitioner also failed to include the necessary amendment to the ordinance <u>after</u> it was enacted. This omission is critical because the ordinance as set forth by Petitioner is not only incorrect but it would effectively ban all adult business, which was not the intent of the ordinance. The documents which amended the ordinance after enactment are set forth beginning at Apx. 17 through Apx. 29.

STATEMENT OF THE CASE

In April 1987 the Coalition of Community Values proposed an amendment to the Hagerstown Zoning Ordinance to regulate the location of adult bookstores and adult movie theaters.[2] The amendments were modeled after an ordinance enacted in Detroit, Michigan which had previously passed constitutional muster before this Court. See Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976). The Hagerstown ordinance was the subject of multiple work sessions and hearings. The proponents of the amendment argued and submitted evidence in support of the ordinance that adult businesses had an

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[2] The facts as alleged by Respondent are supported by the record below. See Record - Paper 8 and the 46 attendant exhibits.

adverse impact upon the downtown Hagerstown area and were inconsistent with plans to improve the area. The City Planning Commission (the "Planning Commission") and the City Council of the City of Hagerstown (the "City" or "Hagerstown") reviewed summaries of studies conducted in other cities (including Austin, Texas, St. Paul, Minnesota, Minneapolis, Minnesota, Los Angeles, California, and Phoenix, Arizona) concerning the adverse impact of increased crime and decreased property values which resulted from adult businesses located in those communities. With regard to Hagerstown, evidence of an order was submitted which had enjoined Petitioner from selling a cocaine dilutant on the premises at issue here. Citizens, by written and

oral statements, complained about pornography while others complained about crime in the surrounding neighborhoods and dwindling real estate values. The City filed appropriate public hearing notices, and held public hearings. No objection was made by anyone to the proposed amendments.

The resolution with the amendments was approved by the Mayor and City Council on September 6, 1988. The City Zoning Ordinance forbids the use of land for "adult bookstores", "adult motion picture theaters" and "adult mini motion picture theaters" in areas zoned C-1 (Commercial Local), C-3 (Commercial Central) and C-4 (Regional Shopping Center). Adult business uses are permitted in C-2 (Commercial General) but cannot be located within 1000 feet

of a church, school, hospital, nursing home, park and other public multi-family dwellings. Further, all nonconforming uses were to be removed from their present location within two years from October 6, 1988.

On September 19, 1990 Petitioner filed a Complaint for injunctive relief in the United States District Court for the District of Maryland alleging that the ordinance violated its First and Fourteenth Amendment Rights. The City answered and subsequently filed a motion for summary judgment with an accompanying memorandum of law. After Petitioner's response, the motion for summary judgment on the matter was referred to Magistrate Klein. Magistrate Klein recommended summary judgment be entered once the

typographical error (the inclusion of C-2 zones in the ban - see Apx. at 4, 12, 16-24, see also Petitioner's Apx. at 9 n.3) was corrected. The Magistrate further found that the ordinance, because it regulated the location of adult bookstores, was not content-based and was a valid time, place and matter restriction on activities protected the First Amendment. Although Plaintiff excepted to the Magistrate's recommendation, the district court entered summary judgment in favor of the City on November 5, 1991. The United States Court of Appeals for the Fourth Circuit affirmed, per curiam, on August 4, 1992.

SUMMARY OF ARGUMENT

The United States District Court for the District of Maryland properly

entered summary judgment in favor of Hagerstown. The amendments to the zoning ordinance -- which regulate location of adult businesses but not their content -- are valid time, place, manner restrictions upon speech and conduct consonant with rights guaranteed under the First and Fourteenth Amendments of the Constitution.

ARGUMENT

In accordance with precedent, the constitutionality of the amendments made to the City's Zoning Ordinance may be determined by application of standards by which government may regulate conduct and speech in United States v. O'Brien, 391 U.S. 367 (1968), and the holdings in American Mini Theaters, supra, and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). Petitioner argues

that enactment of what appears to be a valid time, place and manner restriction, is in effect a method of censoring the two adult businesses located in downtown Hagerstown.[3] Petitioner also argues that the ordinance is unduly restrictive and does not offer reasonable alternative avenues of expression. The arguments are not grounded in fact and ignore the detailed legislative record contained below.[4]

---

[3] Petitioner suggests as an additional argument that the Court should hear this case because of a conflict with decisions issued by the Fifth, Seventh and Tenth Circuits. However, Petitioner has not bothered to cite the allegedly conflicting cases. As a result, this argument should not even be considered.

[4] Petitioner is correct that the purpose of the ordinance is not expressly set forth in the preamble. Nevertheless, this type of statement is not required to survive attack under the First Amendment. Barnes v. Glen Theater, Inc., 111 S.Ct. 2456 (1991).

The Court has stated:

> Government may impose reasonable restrictions on the time, place, or manner of protected speech provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve as a significant governmental interest, and they leave open ample alternative channels for communication of the information'...
>
> * * *
>
> [a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messengers but not others. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). (Citations omitted.)

The ordinance, as amended, is not a content-based regulation. Although the two adult businesses in the City are impacted by the legislation they are clearly not prohibited from exercising

their First Amendment rights.

This Court, in American Mini Theaters, supra, upheld a zoning ordinance which prohibited location of an adult movie theater within 1000 feet of any other two regulated uses, including adult entertainment centers, liquor stores and hotels, or within 500 feet of a residential area. 427 U.S. at 52. The Court found that Detroit's efforts to prohibit the concentration of adult oriented uses in a specified area, so as to prevent urban blight and crime, was a legitimate and substantial government interest. Further, the American Mini Theaters Court stated that cities must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. 427 U.S. at 71. This Court explained that

because the ordinance did not altogether ban adult uses, and because its predominant purpose was a regulation of the negative secondary effects of adult theaters in surrounding communities, by regulating the content of the films, it was content-neutral and therefore constitutional "time, place and manner". Regulation. Id. at 71-73.

Similarly in Renton, this Court reviewed a theater's challenge to the city's zoning ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school. 475 U.S. at 43. This Court again stated that "content neutral time, place and manner regulations are acceptable as long as they are designed

to serve a substantial government interest and do not unreasonably limit alternatives of communication." Renton, 475 U.S. at 47. The ordinance was viewed as a valid time, place and manner restriction enacted in response to the serious problems which resulted from sexually oriented businesses, rather than as an unconstitutional restriction of the content of speech.

The legislative investigation and preparation by the City Council and the Planning Commission were meticulous in detail and action. The City did not quietly railroad the passage of the adult business amendments. The record below is replete with evidence that the City Planning Commission and the City Council reviewed studies of other cities describing the adverse secondary impacts

of adult businesses upon communities. The fact that Hagerstown experienced the adverse impacts of increased crime and decreased property values were further attested to by various residents of Hagerstown in their written and oral statements to the Commission and to the City Council. Contrary to Petitioner's mistaken assertion, there was no constitutional requirement to conduct an empirical study of the adverse impacts of adult businesses in the City of Hagerstown itself. See Renton.

Petitioner finally argues that the courts below did not properly scrutinize the ordinance and did not determine whether the City used the least restrictive means to ameliorate the undesirable secondary effects of these businesses. Both courts below

recognized that Hagerstown did consider and reject two provisions by which the existing stores would be grandfathered in and allowed to continue operating or to allow specific use exemptions. These ideas were rejected after debate, discussion, and a reliance on precedent from this Court and individual testimony. Under the amendment as approved, the adult businesses were merely required to move to another area in the City within a two year period. This is not an undue restriction. Hart Bookstores, Inc. v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980).

The ordinance allows for reasonable alternative avenues of communication. See Renton, 475 U.S. at 53. Prior to the passage of the ordinance the City

undertook a study to determine the availability of potential sites for relocation of the adult businesses. At an August 9, 1988 work session the City determined that 40-50% of the C-2 City zoned area complied with the ordinance spacial restrictions so as to permit operation of adult businesses. In fact, the Court in Renton found that although only 5% of the entire land area therein would be available for adult business, it was sufficient access to survive constitutional challenge. 475 U.S. at 53. Hagerstown, as required by Renton, has enacted an ordinance which is a valid governmental response to the adverse effects created by adult businesses. Id. The end result is the City can rehabilitate its downtown area and Petitioner can relocate its business

and continue to practice its rights under the First Amendment.

CONCLUSION

Respondent respectfully requests this Honorable Court to deny the petition because the Hagerstown Zoning Ordinance, as amended, is constitutionally sound.

Respectfully submitted,

BY: D'Ana E. Johnson

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Attorneys for Respondent

APPENDIX

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Section 1

All persons born or naturalized in United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RESOLUTION

WHEREAS; Article 66B of the Annotated Code of Maryland, and the Charter of the City of Hagerstown, empowers the Legislative Body of The City of Hagerstown to enact, enforce, and amend ZONING ORDINANCES for the purpose of protecting and promotion the health, safety and general welfare of the citizens of The City of Hagerstown; and

WHEREAS; The procedures prescribed for amending the Zoning Ordinance of The City of Hagerstown by Article 66B of the Annotated Code of Maryland, The Charter of the City of Hagerstown, and Chapter 68, Zoning, of the General Code of The City of Hagerstown, have been complied with; and

WHEREAS; The Mayor and Council of The City are desirous of amending Chapter 68, "ZONING," Part 1, "CITY ZONING," Article I, General, by amending Section 68-16. C-1 District (Commercial Local); Section 68.17. C-2 District (Commercial General); Section 68-18. C-3 District (Commercial Central); Section 68-19. C-4 District (Regional Shopping Center); Section 68-24. Nonconforming Uses; Section 68-38, Definitions; specific; and

WHEREAS; The Mayor and Council deem it advisable and to the best interests of the citizenry of The City of Hagerstown to amend and enact certain

revisions to said Ordinance; and

WHEREAS; After complying with all the aforementioned requirements, the Legislative Body for The City of Hagerstown has determined and finds as a matter of fact that certain revisions, amendments, and additions are necessary and desirable; and

BE IT FURTHER RESOLVED, ENACTED, AND ORDAINED that Chapter 68, "ZONING," Part 1, "CITY ZONING," Article 1, General, Section 68-16. C-1 District (Commercial Local); Section 68-17. C-2 District (Commercial General); Section 68-18. C-3 District (Commercial Central); Section 68-19. C-4 District (Regional Shopping Center); Section 68-24. Nonconforming Uses; Section 68-38, Definitions; specific; is amended to include:

Section 68-16. C-1 District (Commercial Local).

B. (Amended 12-4-78) Principal permitted uses, in accordance with Section 68-29; local retail or service shops, other than adult book stores, adult motion picture theaters and adult mini motion picture theaters, including but not limited to:

Section 68-17. C-2 District (Commercial General).

B. (Amended 12-4-78) Principal

permitted uses, in accordance with Section 68-29; including but not limited to:

(25) Adult book store, adult motion picture theater, adult mini motion picture theater, provided no such use may be permitted within one thousand (1000) feet of the boundary of property upon which exists any church, school, hospital, nursing home, park or any multiple-family dwellings owned by public or quasi public authority and intended primarily for use by senior citizens or other similar land uses for human care and needs.

(26) All uses permitted as principal permitted uses in a C-1 District.

Section 68-18. C-3 District (Commercial Central).

B. (Amended 12-4-78) Principal permitted uses, in accordance with Section 68-29; other than adult book stores, adult motion picture theaters and adult mini motion picture theaters, including but not limited to:

Section 68-19. C-4 District (Regional Shopping Center).

B. (Amended 12-4-78) Principal permitted uses, in accordance with Section 68-29; other than adult book stores, adult motion picture theaters and adult mini motion picture theaters, including but not limited to:

Section 68-24. Nonconforming Uses.

C. Except as hereinafter provided, nonconforming uses, as defined herein, shall be allowed to continue in existence in perpetuity, provided that said use does not cease for any reason whatsoever through a period of one (1) year. If any nonconforming use of land shall cease for any reason whatsoever through a period of one (1) year, said nonconforming use shall be deemed to have been abandoned, and the then applicable zoning provisions shall apply to the area in question. (Amended 12-4-78).

D. Adult book stores, adult motion picture theaters and adult mini motion picture theaters, situate in the zoning districts C1, C2, C-3 or C4 at the time this ordinance becomes effective shall be removed by two (2) years from the effective date of the ordinance.

Section 68-38. Definitions; specific.

As used in this ordinance, the following

terms shall have the meanings indicated:

ADULT BOOK STORE - Means an establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," or an establishment with a segment or section devoted to the sale or display of such material.

ADULT MOTION PICTURE THEATER - Means an enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

ADULT MINI MOTION PICTURE THEATER - Means an enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation

by patrons therein.

SPECIFIED ANATOMICAL AREAS - Means:

A. Less than completely and opaquely covered:

(1) Human genitals, pubic region,

(2) Buttock, and

(3) Female breast below a point immediately above the top of the areola; and

B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES - Means:

A. Human genitals in a state of sexual stimulation or arousal;

B. Acts of human masturbation, sexual intercourse or sodomy;

C. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

BE IT FURTHER RESOLVED, ENACTED AND ORDAINED, that the remaining provisions of said Ordinance remain in full force and effect; and

BE IT FURTHER RESOLVED, ENACTED AND ORDAINED, that the following amendment of Chapter 68, ZONING, be and is hereby

enacted; and

BE IT FURTHER RESOLVED, ENACTED AND ORDAINED, that the effective date of this Ordinance shall be and is thirty (30) days from the date of its passage.

WITNESS:

MAYOR AND COUNCIL
OF THE CITY OF
HAGERSTOWN, MARYLAND

_____ By: _____

Georgiann N. Lucas,
City Clerk

Steven T. Sager,
Mayor

DATE: 8/16/88

DATE OF PASSAGE: _____

EFFECTIVE DATE: _____

Code

of the

City of Hagerstown

COUNTY OF WASHINGTON
STATE OF MARYLAND

SERIAL NO. 202

GENERAL CODE PUBLISHERS CORP.
72 Hinchey Road
Rochester, New York 14624
1990

district, any lot recorded among the land records of Washington County prior to the effective date of this chapter shall be deemed to meet the lot area and width requirements of the district.

B. Where at least sixty-six percent (66%) of all lots on both sides of the same street block as the subject lot have been developed, the front and side yard setbacks of the subject lot shall conform to the average established front and side yard setbacks, and the lot area and width requirements shall conform to the average lot area and width.

C. Where, by proper subdivision, lots are created from a lot recorded among the land records of Washington County prior to the effective date of this chapter and where each lot so created contains a residential dwelling that existed prior to the effective date of this chapter and where the purpose of the subdivision is for the transfer of ownership and not for building development, then the lots so created

shall be deemed to meet the lot area, width and setback requirements of the district.

D. This section shall not apply to zero-lot-line development. [Added 3-6-1984]

§68-24. Nonconforming uses.

A. In the event that there is a nonconforming use in existence on the date of adoption of this chapter, the owner or lessee of the premises in question may file with the Zoning Administrator a certification, in writing, of such form furnished by the Zoning Administrator and shall set forth fully the type of nonconforming use and all applicable information in reference to the structure location and general use.

B. Nothing in this chapter shall prevent the restoration of a nonconforming use, building or structure destroyed by fire, windstorm, explosion, act of public enemy, accident or for any other reason whatsoever or prevent the continuance of said nonconforming use, provided that the owners of the property in question shall file with the Zoning

Administrator a notice of intention to continue the nonconforming use within six (6)

months of said destruction or damage, and provided further that said restoration or construction is commenced within one (1) year of the date of said notice of intention to continue the nonconforming use in question. In the event that said notice is not filed, then the nonconforming use in question shall be deemed to have been abandoned.

C. Except as hereinafter provided, nonconforming uses, as defined herein, shall be allowed to continue in existence in perpetuity, provided that said use does not cease for any reason whatsoever through a period of one (1) year. If any nonconforming use of land shall cease for any reason whatsoever through a period of one (1) year, said nonconforming use shall be deemed to have been abandoned, and the then-applicable zoning provisions

shall apply to the area in question. [Amended 12-4-1978; 0-6-1988 by Ord. No. 1988-27]

D. Adult bookstores, adult motion-picture theaters and adult mini-motion-picture theaters situated in Zoning District C1, C2, C3 or C4 at the time this chapter become effective shall be removed by two (2) years from the effective date of the chapter. [Added 0-6-1988 by Ord. No. 1988-27]

E. Structural alterations of a building or structure of the use of a parcel, lot or tract of land which does not conform to the provisions of this chapter shall be allowed only if the building or structure to be altered or the parcel, lot or tract of land to be used is in conformance with the requirements of the zoning district in which it is located; however, upon application, the Board of Zoning Appeals may approve the structural alteration of a building or structure of the use of a parcel, lot or tract of land which is not in conformance with the provisions of the chapter.

The alteration or extension of the same nonconforming use is restricted to ann additional area not exceeding thirty-five percent (35%) of those existing buildings or structures and parcels devoted to a nonconforming use. Said alterations or extensions shall be construed to mean one (1) alteration or extension and shall not be cumulative.

F. Once changed to a conforming use, no building, structure or land shall be permitted to revert to a nonconforming use. A nonconforming use may be changed to another nonconforming use if the applicant shows that the proposed change will have less objectionable external effects than the existing nonconforming use with respect to traffic generation and congestion, including truck, passenger car and pedestrian traffic; noise, smoke, dust, fumes, vapors, gases, heat, odor, glare or vibration; storage and waste disposal, and appearance. Such a changes is termed a

special exception, requiring the approval of the Board of Zoning Appeals.

§ 68-25. Supplemental district regulations.

A. Fences, walls and hedges. No fence or wall shall be constructed in front of the front building setback line. No fences, walls or hedges shall exceed six (6) feet in height. Exceptions may be allowed with approval of the Board of Zoning Appeals.

B. Special height regulations. The height limitations contained in the height regulations and yard requirements do not apply to spires, belfries, cupolas, antennas, water tanks, ventilators, chimneys, poles, towers or other appurtenances not intended for human occupancy.

C. Structures to have access. Every dwelling hereafter erected or moved shall front a lot adjacent to a public street. For the purpose of this section, alleys do not constitute public streets.

D. Parking and storage off certain vehicles. Automotive

vehicles or trailers of any kind or type without current license plates shall not be parked or stored on any R District property other than in completely enclosed buildings.

E. Visibility at intersections. No fence, wall, gateway, ornamental structure, hedge, shrubbery and other fixtures, construction or planting shall exceed three (3) feet in height above the elevation of the nearest curb on a corner lot in all districts where front yards are required for a distance of twenty-five (25) feet along both the front and side lot lines, measured from the point of intersection of the intersecting lot lines.

CITY OF HAGERSTOWN
MARYLAND
21740

OFFICE OF THE CITY CLERK (301) 790-3200
City Hall, Room 200 Extension 112

October 23, 1991

Daniel Karp, Esquire
Allen, Johnson, Alexander and Karp
300 East Lombard Street
Suite 840
Baltimore, Maryland 21202

RE: 23 W. Washington Street v.
City of Hagerstown
Civil Action No.: MJG-90-2443

Dear Mr. Karp:

The Report and Recommendation of the United States Magistrate Judge Daniel E. Klein, Jr. granted the City's Motion for Summary Judgment but recommended that this recommendation not be accepted until the City cured the inconsistency in the ordinance.

Attached is a copy of Ordinance 91-14, approved by the Mayor and City Council on October 22, 1991, amending the Zoning Ordinance to remove the C-2 District from the amortization text. Also attached is a copy of the notice that will be published on October 28 and November 1, 1991, in the Herald Mail Newspapers in Hagerstown, in accordance with the provisions of the Charter of

the City of Hagerstown. Please notify my office if you need a certification of this publication, or any other information on this matter.

Sincerely,

CITY OF HAGERSTOWN

GeorgiAnn N. Lucas
City Clerk

Attachments: As Noted

pc: Robert E. Kuczynski, Esquire
Stephen M. Feller, City Administrator
Richard L. Kautz, Planning Department Manager

LEGAL NOTICE

AMENDMENT TO THE CODE OF THE CITY OF HAGERSTOWN, MARYLAND CHAPTER 68. ZONING, SECTION 68-24 NONCONFORMING USES

Notice is hereby given by the Mayor and Council of the City of Hagerstown, Maryland, a municipal corporation existing under and by virtue of the laws of the State of Maryland, that pursuant to and in accordance with the powers contained in the Annotated Code of Maryland, Article 66B, and the Charter of the City of Hagerstown, amended and adopted on April 6, 1983, the said Mayor and Council, as the legislative body for the City, at a duly constituted meeting of the Mayor and Council held on October 22, 1991, approved a revision to the Code of the City of Hagerstown, Chapter 68. Zoning, Section 68-24. Nonconforming Uses.

This Ordinance amendment specifically amends Section 68.24.D, to delete the C-2 district from the amortization text relating to adult bookstores. All other provisions of Chapter 68 shall remain in full force and effect.

A Public Hearing was held on October 22, 1991. The Mayor and Council enacted this Ordinance as an Emergency Ordinance on October 22, 1991, in accordance with the provisions of Section 208 of the Charter of the City

of Hagerstown. The effective date of said Ordinance is, therefore, October 22, 1991.

The entire Code of the City of Hagerstown in on file and available for inspection between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, in the Office of the City Clerk, City Hall, Room 200, Hagerstown, Maryland, and is incorporated herein by reference.

MAYOR AND COUNCIL OF THE
CITY OF HAGERSTOWN,
MARYLAND
GeorgiAnn N. Lucas,
City Clerk

Robert E. Kuczynski
City Attorney

PUBLISH AS LEGAL NOTICE: Monday, October 28, 1991
Friday,
November, 1,
1991

BILL Account # CLRK0007903200

Send Bill and Certification to:

CLRK, City Hall
GeorgiAnn N. Lucas,
City Clerk
City Hall, Room 200
1 East Franklin Street
Hagerstown, Maryland

EMERGENCY ORDINANCE

CITY OF HAGERSTOWN, MARYLAND
ORDINANCE NO. 91-14

ZONING
SECTION 68-24 - NONCONFORMING USES

AN ORDINANCE TO AMEND the Code of the Hagerstown, Chapter 68 thereof entitled, Zoning, to delete the C-2 district from the amortization text relating the adult bookstores.

BE IT ORDAINED AND ENACTED by the Mayor and Council of the City of Hagerstown, as follows:

Section 1. Chapter 68 of the Code of the City of Hagerstown, Section 68-24, D, is hereby amended to read as follows:

Section 68-24. Nonconforming uses.

D. Adult book stores, adult motion pictures adult motion picture theatres, situate in the zoning districts C-1, C-3, C-4 at the time this ordinance becomes effective shall be removed by two (2) years from the effective date of the ordinance.

Section 2. All other provisions of Chapter 68 shall remain in full force and effect.

Section 3. In accordance with Section 208 of the Charter of the City of Hagerstown, this Ordinance is considered to be an emergency ordinance and, therefore, the effective date of this ordinance shall be October 22, 1991.

MAYOR AND COUNCIL OF THE CITY OF HAGERSTOWN, MARYLAND

WITNESS: By: _____
Steven T. Sager,
Mayor

_____
GeorgiAnn N. Lucas,
City Clerk

DATE OF INTRODUCTION: OCTOBER 22, 1991
DATE OF PASSAGE: OCTOBER 22, 1991
EFFECTIVE DATE: OCTOBER 22, 1991

ALLEN, JOHNSON, ALEXANDER & KARP, P.A.
ATTORNEYS AT LAW
SUITE, 840, 300 EAST LOMBARD STREET
BALTIMORE, MARYLAND 21202
---
(301) 727-5000

FAX LINE (301) 727-0861

November 1, 1991

Honorable Marvin J. Garbis
Judge
United States District Court
for the District of Maryland
101 W. Lombard Street
Baltimore, Maryland 21202

RE: 21 West Washington Street, Inc. v. City of Hagerstown, Maryland
Case No.: MJG-90-244
My File No.: 310-341

Dear Judge Garbis:

The City of Hagerstown zoning ordinance at issues in this case (§68-24) has now been corrected in accordance with Footnote 3, page 4, of the August 21, 1991 Report and Recommendation of Magistrate Klein. A copy of Ordinance No. 91-14, effective October 22, 1991, is enclosed.

You may note that Ordinance No. 91-14 corrects §68-24D, although Magistrate

Klein indicated in his Footnote 3 that the typographical error was found in §68-24F. When the ordinance at issue was adopted in 1989, the paragraph at issue (concerning adult book stores) was Paragraph F. See Paper No. 8, Exhibit 46, at page 39, in the Court's file. However, when the ordinance was reprinted in 1990, the printer shifted the various paragraphs of §68-24 around, with the result that the language concerning adult book stores was moved from Paragraph F to Paragraph D. Please find enclosed, in that regard, a photocopy of the 1990 codification of the ordinance.

Consequently, new ordinance no. 91-14 amends what is now §68-24D, but what was, as originally enacted, §68-24F.

I regret the confusion. However, I believe that the City has now amended the ordinance at issue to comply with Magistrate Klein's Footnote No. 3. If Mr. Schulman disagrees, I am sure that he will tell the court promptly.

Sincerely yours,

ALLEN, JOHNSON, ALEXANDER
& KARP

By: Daniel Karp

DK/th
cc: Clerk, U.S. District Court for the
District of Maryland
Howard J. Schulman, Esquire
Robert E. Kuczynski, Esquire